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In The

Supreme Court of the United States

DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD,

Cross-Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF CROSS-PETITIONER DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD

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REPLY BRIEF OF CROSS-PETITIONER DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD

The Cross-Petition filed by the Dallas-Fort Worth International Airport Board presented two questions. The first question – whether DFW's use agreements are enforceable – was opposed by the Department of Transportation and American Airlines, Inc. The second question – whether DOT's interpretation of the Wright Amendment conflicts with a holding of the D.C. Circuit – was opposed by DOT and by Continental Express, Inc. This brief replies to all briefs in opposition to DFW's Cross-Petition.

For convenient reference, DFW Airport has restated the question at issue immediately preceding its reply discussion on that issue.

Question One

DFW Airport – like most airports – enters into bargained-for, comprehensive "use agreements" with airlines using its facilities. In exchange for long-term terminal leases, reduced lease rates, and fuel and landing-fee discounts, the signatory airlines agree to serve the Dallas/Fort Worth area exclusively from DFW. Under these facts:

- Does the Fifth Circuit's holding that the exclusivity provision in DFW's use agreement is preempted by the Airline Deregulation Act conflict with this Court's precedent providing that the ADA does not preempt voluntary, self-imposed contracts?
- Does one 38-word sentence in the 100-page use agreements, referring to the 1968 Bond

Ordinance passed to finance DFW's construction, convert those agreements into an attempt at local regulation of air service, thereby preempting the exclusivity provision under the Airline Deregulation Act?

DFW's Reply

Respondent DOT's brief in opposition to DFW Airport's Question One attempts to misdirect the attention of the Court. The DFW use agreements are not local laws, but contracts voluntarily entered into between certain airlines and the airport. Such contracts are not subject to ADA preemption because they are not regulatory.[1] Rather, these contracts, even though entered into by local governments, are like the proprietary local government contracts upheld by the Court in *Building & Construction Trades Council v. Associated Builders & Contractors*[2] and by the Ninth Circuit in *Associated General Contractors v. Metropolitan Water District*.[3]

As for the applicability of *American Airlines, Inc. v. Wolens*[4], DOT's notion that the airport is a local government is irrelevant because the airport was acting in its proprietary capacity. What is crucial under *Wolens* is that the use agreements create enforceable "privately ordered obligations" that preclude ADA preemption.

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[1] *See Cardinal Towing Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999).

[2] *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218 (1993).

[3] *Associated General Contractors v. Metropolitan Water District*, 159 F.3d 1178 (9th Cir. 1998).

[4] *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817 (1995).

DFW Airport's Question One is not – as American Airlines suggest – exclusively derivative of or dependent upon the Court's decision on the question presented in American's Petition concerning the proprietary powers and rights of local governments to allocate air traffic. Certainly it is reasonable to believe that if the Court reverses the Fifth Circuit on American's proprietary rights argument, then – under the Fifth Circuits' rationale – DFW's use agreements will be fully enforceable. The Fifth Circuit wrongly concluded that the use agreements were, in part, unenforceable because the 1968 Regional Airport Concurrent Bond Ordinance was preempted by the Airline Deregulation Act;[5] conversely, this Court's ruling that the Bond Ordinance is *not* preempted will, applying the Fifth Circuit's rationale, revive any unenforceable portions of DFW's use agreement.

But American is incorrect in suggesting that if the Court affirms the Fifth Circuit then the use agreements remain partially unenforceable. As explained in DFW Airport's Cross-Petition, even if the Bond Ordinance is preempted the mere reference to the Ordinance in the use agreement does not preempt the use agreement.[6] The text of the Bond Ordinance becomes a contract term and judicial interpretations of the Bond Ordinance's validity are irrelevant.[7]

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[5] 49 U.S.C. § 41713(b)(1); *see* FW Pet.App. 136.

[6] *See* DFW Cross-Pet. at 18-19, citing *Overton v. City of Houston*, 564 S.W.2d 400, 403 (Tex.Civ.App. – Houston [1st Dist.] 1978), writ ref'd n.r.e.

[7] *See Craddock Internat'l Inc. v. W.K.P. Wilson & Son, Inc.*, 116 F.3d 1095, 1107-08 (5th Cir. 1997).

Section 3.2 of DFW's use agreement requires a signatory airline to "conduct its Certificated Air Carrier Services serving the Dallas-Fort Worth area to, from and at the Airport, to the extent required by the terms of the 1968 Regional Airport Concurrent Bond Ordinance.[8] The incorporated terms of the Bond Ordinance effectively restrict certificated (that is, interstate) service of the signatory airlines to DFW.[9]

But Section 3.2 of the use agreement is a valid exercise of proprietary powers *even if the Bond Ordinance is not*. If one assumes, for the sake of argument, that the inclusion of Section 3.2 *and* the passage of the Bond Ordinance were both calculated to restrict passenger service from Love Field, each affects the airlines in fundamentally different ways: one is a contract, the other an ordinance. Airlines signing use agreements agreed to – knowingly assented to – the terms of the use agreement. In contrast, the signatory airlines had no role in crafting the Bond Ordinance and no power to accept or reject it – until they voluntarily embraced it as a contract term. The Bond Ordinance was (arguably) a regulation to which compliance was compelled, not voluntarily accepted. The signatory airlines willingly and with full awareness of its terms accepted Section 9.5 of the Bond Ordinance as part of the comprehensive deal they made with DFW – a deal from which every signatory airline has greatly benefitted.

This is precisely the kind of voluntary action that will not be preempted under this Court's holding in *American*

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[8] DFW Cross-Pet.App. 9.

[9] FW Pet.App. 58-59.

Airlines, Inc. v. Wolens.[10] The Court has not sanctioned preemption of "self-imposed undertakings." Section 3.2 of the use agreement can be enforced because the signatory airlines voluntarily agreed to contract terms expressed in incorporated language of the Bond Ordinance, not because of the passage of the Bond Ordinance itself.

American tells the Court that "a State" cannot save a regulation that it lacks the power to impose by making it into a contract.[11] Maybe so, but pulling language from the 1968 Bond Ordinance into the 1985 use agreement was nothing more than an attempt to define the consideration exchanged between DFW and the signatory airlines; it was not a maneuver to circumvent an ordinance that no one (not even DOT) could have foreseen was in jeopardy of preemption. For this presumably correct (but irrelevant) statement of the law, American cites *Cardinal Towing Auto Repair, Inc. v. City of Bedford* in "accord."[12] Invocation of *Cardinal Towing* is itself a curious maneuver because DFW Airport would enthusiastically welcome the same kind of analysis in this case that the Fifth Circuit employed in *Cardinal Towing*.

In *Cardinal Towing* – unlike what it did in this case – the Fifth Circuit looked to the scope of the contract for the activities it covers to determine whether the contract is forbidden regulation. DFW's use agreements exhaustively describe an array of benefits for the signatory airlines, including long-term terminal leases,

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[10] *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817 (1995).

[11] American Opp. 9-10.

[12] 180 F.3d 686 (5th Cir. 1999).

reduced lease rates, fuel discounts, and landing-fee discounts. As consideration for these benefits, the signatory airlines agree to maintain service at DFW to the extent required by the Bond Ordinance. The mere reference to the ordinance in one item of a 100-page comprehensive contract does not make the agreement co-extensive with the ordinance and does not transform the contract into government regulation.

American wants relief from the contractual consideration it gives in Section 3.2 based on what certainly must be a seldom-used, if not unprecedented, argument that it was in a relatively weak bargaining position. American tells the Court that is "absurd" to think that it *voluntarily* signed the use agreements. If, in truth, American made the deal with DFW involuntarily, American has certainly benefitted handsomely from coercion; many of American's competitors would enjoy such oppressive treatment. Airlines are not required to sign the use agreement to provide services at DFW, but only the signatory airlines receive the financial benefit of doing so. Nothing, except the expected benefits of the deal, compelled American and the other airlines to sign the original and the current versions of the DFW use agreement.

American concludes its opposition with the observation that the Bond Ordinance required the transfer of services from Love Field to DFW only to the extent "legally permissible."[13] Because the Fifth Circuit ruled that the Bond Ordinance is preempted – so American's argument goes – there is no enforceable obligation under Section 3.2 of DFW's use agreement.

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[13] FW Pet.App. 59.

Rather than obscuring the phrase "legally permissible" with a gloss of current events, it seems much more reasonable and reliable to find its meaning in the parenthetical phrase that immediately follows the term; what is legally permissible was that which *could then be done* "without violating presently outstanding legal commitments or covenants prohibiting such action," – that is, the phase-out. It makes little sense to believe that use of the phrase "legally permissible" was an allusion to laws that were more than ten years in the future.

Enforcement of DFW's use agreement to restrict signatory airline service to DFW is not, as American argues, based on "state laws or policies external to the agreement;" the ordinance has been expressly incorporated into the use agreement and can be understood without reference to any other language. DFW's contract with its airlines can be enforced by looking only at the use agreement provisions and their incorporated terms.

Question Two

The Fifth Circuit upheld DOT's interpretation that the Wright Amendment's commuter airlines exception allows single-ticket service from Love Field to points beyond the Love Field Service Area, *if* a first leg is flown intrastate on a 56-seat aircraft that then connects at a Texas airport for a second-leg, interstate flight. Does the Fifth Circuit's holding conflict with the D.C Circuit's view that Congress intended to keep Love Field a short-haul airport?

DFW's Reply

DOT's opposition consists entirely of the conclusory observation that its prior interpretation of the through ticketing restrictions and the D.C. Circuit's affirmance of it do not conflict with DOT's more recent interpretive proceeding and its affirmance by the Fifth Circuit.

Fifteen years ago, DOT interpreted the through ticketing provisions so that Continental Airlines:

> could not evade the Amendment's restrictions by providing flights, for example, between Love Field and Houston and then continuing the flights between Houston and points outside the five-state area.
>
> * * *
>
> . . . the carrier cannot offer, promote, or sell through service and fares or tickets between Love Field and points outside the authorized service area using another Texas city as the connecting point.[14]

In *Continental Airlines v. Department of Transportation*, the D.C. Circuit determined that the " . . . DOT's interpretation is consistent with the purpose of the Amendment to limit Love Field to short-haul services."[15]

DOT and Continental attempt to patch over the contradiction between the D.C. Circuit's affirmance of DOT's 1985 order and the Fifth Circuit's (seemingly reluctant) affirmance of DOT's 1998 interpretation by telling the Court that the 1985 Order addressed only Love Field

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[14] *Love Field Amendment Proceeding*, DOT Order 85-12-81, 1985 WL 57886 (1965); DFW Cross-Pet. 21-22; DFW Cross-Pet.App. 10-21.

[15] *Continental Air Lines v. Department of Transportation*, 843 F.2d 1444, 1454-55 (D.C. Cir. 1988).

flights made with what its calls "large jets" that are governed by subsection (c) of the Wright Amendment, rather than the aircraft equipped for fewer than 56 passengers.[16] But in 1985, as well as now, the Continental flights that take Love Field passengers from Houston to "the World" are conducted on large aircraft that are subject to the through ticketing restrictions of subsection (c).

No right-minded reason exists – and certainly none has been offered – to warrant or explain DOT's opening to "the World" an airport that it and the D.C. Circuit recognized to be a short-haul airport. Changing the size of the aircraft on the first leg of a through flight is not a factual difference that justifies DOT's flip flop or reconciles the conflict in the Circuit Court opinions.

Continental finally attempts to reconcile the conflict by arguing that between the 1985 DOT Order and the 1998 Order, Congress expressed a new intent – by passing the Shelby Amendment – to open Love Field to long-haul service.[17] But, the Shelby Amendment did not change Congress' short-haul role for Love Field. Rather, it merely modified the commuter airline exception to allow jets with 56 or fewer seats to operate under this provision. It did not change the scope of operations for large jet services. By authorizing commuter service at Love Field to jets with 56 or fewer seats, the Shelby Amendment did not change the Wright Amendment's inherent limitation

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[16] Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35, 48 (1980); DFW Cross-Pet. 2-3.

[17] Section 337(a) and (b) of the Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997); DFW Cross-Pet. 3.

to expanded service: fewer passengers, fewer locations, less efficiency. Nothing in the Shelby Amendment changed the Wright Amendment to permit long-haul flights with larger capacity planes; if Congress intended to do so, it failed to put its intentions into words. The Circuit Courts' conflicting interpretations of the commuter airlines exception should be resolved.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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